

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

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CRIMINAL NO: 07-354

v.

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SECTION: "R"

HERMANN EICKE, III

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FACTUAL BASIS

Should this matter proceed to trial, the United States would prove beyond a reasonable doubt, through credible testimony and reliable evidence, the following facts:

In August, 2004, **HERMAN EICKE, III, ("EICKE")** was employed by Elliot's Small Arms, a federal firearm's business located at 3008 Jefferson Highway, Jefferson Parish, Louisiana. Timothy Harris, Sr. ("Harris"), who held a Federal Firearm's License ("FFL"), owned Elliot's Small Arms and the property from which it operated. On or about August 19, 2004, due to repeated record-keeping violations, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") notified Harris that his FFL was revoked. Elliot's Small Arms continued to operate as Harris appealed the revocation of his FFL, which was ultimately denied.

In or near early February, 2005, **EICKE** was approached by Harris who asked **EICKE** to acquire a FFL so the gun store could continue to operate. Harris made it explicitly clear to **EICKE**

that Harris would continue to own, and exercise authority and control over the business. In exchange, Harris agreed to pay **EICKE** a salary of \$1,000, per week. **EICKE** accepted Harris's offer and on February 25, 2005, executed an application to obtain a FFL. In the application, **EICKE** represented that he would be the sole owner and solely responsible for the business named Elliot's Gun Shop, located at 3008 Jefferson Highway, Jefferson Parish, Louisiana. **EICKE** represented that he intended to lease the premises from which Elliot's Gun Shop would operate from Harris. Despite knowing that these representations were false, **EICKE** made such representations at the direction of Harris, to legitimize the federal firearms application.

An agreement to "Buy and Sell," accompanied the application, that memorialized the pending sale and transfer of Elliot's Small Arms' firearms inventory by Harris, to **EICKE**. The terms of the contract memorialized that **EICKE** would purchase Elliot's Small Arms' inventory from Harris for \$165,000 in the form of a promissory note. A commercial lease also accompanied the application where **EICKE** agreed to lease the premises owned by Harris located at 3008 Jefferson Highway, Jefferson Parish, Louisiana, from May 1, 2005 through April 30, 2010, for a monthly rental payment of \$900.

Neither **EICKE** nor Harris ever contemplated that any of the terms of the contract or the commercial lease would be satisfied. **EICKE**, at the direction of Harris, simply attached the contract and the commercial lease to the application in an effort to further substantiate its legitimacy. **EICKE** never made a legitimate lease payment or a payment on the contract to Harris during the conspiracy. On March 4, 2005, ATF received **EICKE'S** application to acquire a FFL. On April 26, 2005, ATF approved the application and authorized **EICKE** to become a FFL holder.

On May 16, 2007, federal agents arrested **EICKE** on a federal warrant at his residence in Kenner, Louisiana. **EICKE** subsequently executed a written waiver of his Miranda rights and agreed to an audio-taped interview with federal agents. **EICKE** admitted that he knowingly and willfully conspired with Harris to obtain the FFL along with the fraudulent lease and contract agreement. When asked whether he was the true owner [of Elliot's Gun Shop], **EICKE** responded, "No, I'm not." When asked who was in ultimate control of Elliot's Gun Shop, he responded, "Tim Harris, Senior." **EICKE** was also asked whether he had a financial incentive to submit the "fraudulent application packet" to the ATF. **EICKE** responded, "He [Harris] was going to pay me \$1,000 a week until retirement. I had, ah, slightly more than three years to go 'til retirement. And, uh, and I just wanted to go through until retirement. Because if he [Harris] lost his license, I was out of a job. So was a lot of other people. But, ah, at my age you just don't go around the corner and get another job."

On May 1, 2005, Elliot's Gun Shop opened under the ostensible authority of **EICKE**, and continued to operate until May 16, 2007. Frequently, mainly due to greed, employees of Elliot's Gun Shop transferred firearms to customers, despite those customers inserting a "Yes" response to a question(s) on ATF Form 4473 that prohibited them from possessing a firearm. For example, prior to taking receipt of a firearm, a customer may have responded affirmatively, in writing, to question 11b. on the Form 4473, which asks "Are you under indictment or information in any court for a felony or any other crime, for which a judge could imprison you for more than one year?" However, notwithstanding the response, employees would frequently consummate the transaction and transfer

a firearm(s) to the customer. Subsequently, **EICKE** would review the Form 4473's which memorialized the transfer of a firearm(s) to customers.

When **EICKE** reviewed a Form 4473 and observed a question answered in the affirmative that prohibited a person from possessing a firearm, and yet a firearm was still transferred to the customer, he would direct the employee who consummated the transaction to arrange for the customer to return to the store to complete a new Form 4473. **EICKE** directed employees to ensure that the customer indicated on the new form that he/she was not prohibited from possessing a firearm. Either **EICKE**, or the employee at **EICKE'S** direction, would require the customer to falsely change his/her response from a "Yes" to a "No," and backdate the form to the date of the original transaction, to make it appear that Elliot's Gun Shop engaged in a lawful transaction with the customer. In most instances, after the customer executed the new Form 4473, **EICKE** would dispose of the original Form 4473 that the customer executed when he/she initially received the firearm.

On March 22, 2007, customer J.B. executed a Form 4473 in Elliot's Gun Shop as he was attempting to purchase a Glock Model 27, .40 caliber pistol. On the Form 4473, J.B. responded "Yes" to the question regarding whether he had been convicted in any court of a misdemeanor crime of domestic violence. Because he indicated he had been convicted of a crime of domestic violence, Elliot's Gun Shop was prohibited from transferring him a firearm. J.B. truthfully indicated on the Form 4473 that he resided at 830 North Hennessey Street, New Orleans, Louisiana, 70119. An Elliot's Gun Shop employee ("Employee #1"), who was assisting J.B., contacted the National Instant Background Check System (NICS) to determine if he was authorized to transfer the firearm to J.B.

The response from the NICS was “Delayed” which prohibited Employee #1 from transferring the firearm to J.B. on March 22, 2007.

After a customer executes a Form 4473, employees of Elliot’s Gun Shop, as a matter of law, were required to contact the NICS to determine if they were authorized to transfer a firearm to the customer. The NICS provided one of three responses: (1) “Proceed”; (2) “Denied”; or, (3) “Delayed.” In those instances when the response was “Delayed,” Elliot’s Gun Shop, as a matter of law, was permitted to transfer the firearm to the customer if it did not receive a follow up response from the NICS within three business days.

On March 28, 2007, J.B. returned to Elliot’s Gun Shop to complete the transaction. Since the gun shop had not received any additional instruction from the NICS since March 22, 2007, Employee #1 transferred the firearm to J.B. At Employee #1's request, J.B. affixed his signature to the re-certification line on the original Form 4473 that he originally executed on March 22, 2007, thereby re-certifying his previous responses remained correct. It should be noted, the Form 4473 only requires the customer’s signature when he/she originally executes the form and, again, if the customer is required to re-certify that the previous responses he/she provided remained correct. J.B. accurately affixed the date, “March 28, 2007,” to represent the date in which he affixed his signature on the re-certification line. After paying for the firearm, on March 28, 2007, J.B. left Elliot’s Gun Shop with the Glock pistol.

Minutes after J.B. left Elliot’s Gun Shop with the firearm, **EICKE** reviewed J.B.’s executed Form 4473. **EICKE** noticed that J.B. was prohibited from possessing a firearm, due to his response that he had been convicted of a misdemeanor crime of domestic violence. **EICKE** told Employee

#1 to immediately call J.B. and to tell him to return to the gun shop. Within approximately fifteen minutes after leaving the store with the firearm, J.B. was contacted on his cellular phone by Employee #1, and was directed to immediately return to Elliot's Gun Shop.

Once J.B. returned to Elliot's Gun Shop, Employee #1 and **EICKE** met with J.B. and directed him to execute a new Form 4473. Employee #1, at **EICKE'S** direction, told J.B., in the new Form 4473, to respond "No" to the question regarding whether he had been convicted of a crime of domestic violence. However, as J.B. was completing the second Form 4473, he once again answered "Yes" to the question regarding whether he had been convicted of a crime of domestic violence. When Employee #1 and **EICKE** noticed that he again responded that he had been convicted of a crime of domestic violence, they again told him to answer "No" to that question. J.B. asked why was he required to answer "No." Employee #1 remarked, in **EICKE'S** presence, that if he [J.B.] did not respond that he had not been convicted of a crime of domestic violence, then he could not keep the Glock firearm. **EICKE** appeared to adopt Employee #1's statement since he did not react to it, and **EICKE** continued to monitor J.B. as he executed a third Form 4473. Employee #1 and **EICKE** provided J.B. with a third Form 4473 to execute. J.B. executed the third Form 4473 and responded "No" to the question regarding whether he had been convicted of a crime of domestic violence. Additionally, on the third Form 4473, at Employee #1 and **EICKE'S** direction, J.B. indicated that his current address was 432 Short Street, New Orleans, Louisiana, 70119. Despite the fact that on March 28, 2007, J.B.'s address was 830 North Hennessey Street, New Orleans, LA, 70119, because his former address was listed on his Louisiana driver's license, Employee #1 and **EICKE** told him to indicate on the Form 4473 that it still was his current address. Further,

Employee #1 and **EICKE** directed J.B. to backdate the Form 4473 to March 22, 2007, to indicate that March 22, 2007, was the date he originally completed and signed the form, despite the fact that he executed the entire form on March 28, 2007. After fully executing the Form 4473 to Employee #1 and **EICKE'S** satisfaction, J.B. left Elliot's Gun Shop with the Glock firearm. Employee #1 and **EICKE** disposed of the original Form 4473 that J.B. executed on March 22, 2007, and the second semi-completed Form 4473 that J.B. filled out on March 28, 2007. J.B. was interviewed by ATF and confirmed all of the aforementioned information. Further, J.B. erroneously believed that he had been convicted of a crime of domestic violence.

On March 28, 2007, an ATF informant recovered from the trash inside Elliot's Gun Shop the original Form 4473 and second semi-complete Form 4473 that J.B. executed on March 22, 2007, and March 28, 2007, respectfully. The informant provided both forms to ATF. On May 16, 2007, ATF recovered the Form 4473 that was kept on file at Elliot's Gun Shop, which memorialized the transaction that resulted in J.B.'s purchase of the Glock Model 27, .40 caliber pistol. The Form 4473 indicated that J.B. originally executed it on March 22, 2007.

On October 4, 2006, the informant waited on a customer named B.D. B.D. executed a Form 4473 in order to purchase a Ruger Model P90 pistol. B.D. answered "Yes" to the question on the Form 4473 regarding whether he was "Under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year?" The informant, as a result of not reviewing B.D.'s response on the Form 4473 that prohibited him from possessing a firearm, contacted the NICS to determine if he was authorized to transfer the firearm to B.D. The response from the NICS was "Delayed," which prohibited the transaction from being completed on

October 4, 2006. The informant told B.D. that he could sell him the firearm in three business days unless NICS denied the sale.

B.D. returned to Elliot's Gun Shop on October 7, 2006. He paid for and received the Ruger Model P90 pistol from another store employee, ("Employee #2"). On October 7, 2006, B.D. affixed his signature on the re-certification line of the Form 4473 that he originally executed, which confirmed that all of the information that he originally provided on the form was still correct. On or about October 8, 2006, **EICKE** reviewed the Form 4473 that B.D. executed, and noticed that the form indicated that B.D. was prohibited from possessing a firearm, based on his response regarding whether he was currently under indictment. **EICKE** then directed the informant, who had originally waited on B.D., to arrange for B.D. to return to the store and execute a new Form 4473. **EICKE** further instructed the informant to ensure that B.D. changed his answer from "Yes" to "No," with respect to the question regarding whether he was currently under indictment.

On or about October 10, 2006, personnel from the NICS contacted **EICKE** and stated that because B.D. was prohibited from possessing a firearm, his request to purchase a firearm was denied. As of October 12, 2006, the informant had been unable to arrange for B.D. to return to Elliot's Gun Shop. However, when the informant arrived to work that day, he was equipped with an electronic audio and video recorder. The informant engaged in a conversation with Rebecca Zitzmann ("Zitzmann"), another store employee, regarding whether B.D. had returned to the store the preceding day, when he had not worked. Zitzmann told the informant that although B.D. had not returned to the store, **EICKE** had changed the Form 4473 that B.D. had executed by crossing through the "Yes" response and beside it inserting a "No" response. Zitzmann proceeded to tell the

informant about the conversation that she had with **EICKE** as he was in the process of changing the “Yes” answer to a “No” answer. The following is the relevant part of the aforementioned conversation between Zitzmann and the informant, which was transcribed from the digital recorder worn by the informant:

Informant: Did a guy [B.D.] come in yesterday to change a 4473;
a black guy?

Zitzmann: “I don’t know.”

Informant: “Alright, cause he [B.D.] answered ‘Yes’.”

Zitzmann: “Oh, the one they [the FBI] called on?”

Informant: “Denied?”

Zitzmann: “Yeah.”

Informant: “OK.”

Zitzmann: “Oh, no, Hermann was hollering, “Oh, I’m gonna lose the license [his FFL] because I’m changing this and then they take him [B.D. for unlawfully possessing the gun] to court, they’re going to know I did it [sold him the gun], that it wasn’t him.”

Informant: “All they’re gonna do is f***** take the gun.”

Zitzmann: “I said [to **EICKE**] ‘All it’s going to be is your word against his [B.D.’s] - he’s the criminal’.”

Informant: “Right.”

Zitzmann: “We always did it.”

Informant: “What, he [**EICKE**] fixed it?”

Zitzmann: “I said [to **EICKE**] ‘We’ve been doing it for f***** years. You know it.’ You know.”

Informant: “Right, because he [EICKE] made me call the guy [B.D.]”

Zitzmann: “Yeah he [EICKE] did [change the response on the form].” He [EICKE] says, ‘I’m going to lose the f***** license.”

Informant: “So he took care of it; the guy B.D.?”

Zitzmann: “Oh, the guy didn’t come in, Hermann did it.”

Informant: “Oh. OK. Alright.”

Zitzmann: “I was going to say [to EICKE], I’ll change it [B.D.’s Form 4473] myself. All you need to do, is when you’re here, say, ‘Hermann, the guy’s here,’ when it’s busy, and then just bring it [an executed Form 4473 that needs to be changed] up front and f***** change it yourself. Jeez, ya know.”

Zitzmann: “He [EICKE] was hollering at me. I had like three of them [Form 4473's] in the stack and I fixed them. Just stupid s***, even the signature. Even though it didn’t match.”

On May 16, 2007, the ATF recovered the aforementioned Form 4473 that memorialized the transfer from Elliot’s Gun Shop of a Ruger Model P90 pistol to B.D. The Form 4473 indicated that Employee #2 consummated the transaction with B.D. on October 7, 2006. When the ATF recovered the form a “Yes” response to the question regarding whether B.D. was currently under indictment or information was marked out, and a “No” response was inserted in its place. The initials “BD” were affixed beside the “No” response. Upon further investigation, it was determined that B.D. was currently under indictment for a felony offense in October, 2006.

At times employees of Elliot’s Gun Shop such as the informant, Zitzmann, and another store employee (“Employee #3”), would fail to have customers sign the re-certification line on Form 4473,

when the customers returned to Elliot's Gun Shop to consummate the transaction and take receipt of the firearm.

On several occasions, the informant, both before and after he began assisting the ATF in its investigation, provided Zitzmann with Form 4473's to forge the customer's signature on the re-certification line. On each occasion, after the informant saw Zitzmann forge the customer's signature on the re-certification line, the informant would return the form to **EICKE**. On at least two occasions, Employee #3 provided Zitzmann with Form 4473's to forge a customer's signature on the re-certification line. On each occasion, after Employee #3 saw Zitzmann forge the customer's signature on the re-certification line, Employee #3 would either return the form to **EICKE** or put it on or near his desk. Zitzmann would further forge customers' signatures on the re-certification line with respect to those forms in which she consummated transactions with customers but failed to have the customer affix his/her signature on the re-certification line.

When reviewing those Form 4473's that included the customer's forged signature on the re-certification line, **EICKE** would be heard, in a declarative tone, complaining (words to the effect), "These two signatures don't match up." On at least two occasions **EICKE** provided the informant, both before and after the informant began assisting ATF, a Form 4473 and directed the informant to arrange for the customer to return to the store and sign the re-certification line. After receiving the form from **EICKE**, the informant took the form to Zitzmann who forged the customer's signature and the informant then promptly returned the form to **EICKE**. **EICKE** reviewed the form and accepted it without complaint.

In **EICKE'S** May 16, 2007, Mirandized statement, he was asked if he had any knowledge of employees altering Form 4473's during his tenure at Elliot's Gun Shop. **EICKE** stated, "I watched some, ah, where signatures were put on, line 24 I think it is, when the customer picks up a gun on a day other than the day the background check was run and the customer who has left the store without signing the form, and I watched Becky [Zitzmann] sign those forms." Line 24 on the Form 4473 is the re-certification line.

From May 1, 2005 through May 16, 2007, Harris exercised sole authority over what firearms would be purchased from wholesalers and sold in Elliot's Gun Shop. Harris either ordered the firearms from wholesalers himself or delegated that responsibility to other store employees. However, store employees, were, in almost all instances, limited to ordering only those firearms in which Harris previously authorized the store to purchase and sell. From May 1, 2005, through May 16, 2007, Elliot's Gun Shop sold approximately 13,200 firearms.

In addition, Harris exercised the ultimate authority over business related decisions at Elliot's Gun Shop such as mark-ups on firearms, inventory, hiring decisions, and establishing store policy. **EICKE** stated in his audio taped interview to law enforcement that Harris made the final business-related decisions which included hiring and firing [employees] and payroll. Further, Harris exercised this authority without being licensed under federal law. Harris conspired with **EICKE** to knowingly and willfully violate the law; that is, to engage in the business of dealing in firearms without a federal license.

Due to the surge in business experienced as a result of Hurricane Katrina, Harris decided to increase the mark-up on firearms sold in Elliot's Gun shop, depending on the type of firearm, from

approximately 20% - 80%. Because the hurricane-related demand for firearms receding by September, 2006, Harris decided to reduce the mark-up on certain firearms sold in Elliot's Gun Shop. On September 16, 2006, Harris engaged in a conversation regarding the demand for firearms after Hurricane Katrina which resulted in him being able to increase the mark-up on such firearms. Harris stated, "I had to come back to normal [regarding returning to pre-hurricane firearm prices in Elliot's Gun Shop]. The high is over with." Harris further remarked, regarding the profit margin on firearms Elliot's Gun Shop sold during the first gun show it participated in after the hurricane, that he was making nearly \$150 per gun "this time last year." The aforementioned statements made by Harris were captured on a digital recording device worn by the informant.

On September 16, 2006, Zitzmann engaged in a conversation with an officer for the New Orleans Police Department at a gun show at the Pontchartrain Center. The officer told Zitzmann that he had recently been in Elliot's Gun Shop looking at firearms and that he had been treated rudely by **EICKE**. Zitzmann told the officer that "Tim" had spoken to **EICKE** about his inappropriate behavior with customers. Zitzmann told the officer that **EICKE** had been told "to stay off the [sales] floor" by "Tim," and that **EICKE** does not behave in the manner described by the officer when "Tim and I" are in the store. The informant and Employee #3 stated that each of them heard Zitzmann making remarks in Elliot's Gun Shop about **EICKE** being required to stay off of the sales floor because of his poor attitude. Between May 1, 2005 and May 16, 2007, there were periods when **EICKE** was, in fact, banned from interacting with customers on the sales floor.

Harris also delegated certain responsibilities to employees that ensured that Elliot's Gun Shop remained stocked with different types of inventory. Harris conferred authority to the

informant to order tactical equipment. Further, Harris conferred authority to Employee #3 and another employee ("Employee #4") to order ammunition and holsters, respectfully.

During his interview on May 16, 2007, **EICKE** was asked, due to a number of disagreements he had with Zitzmann in Elliot's Gun Shop, why he didn't fire her. **EICKE** stated, "I can't fire her. I can't control her . . . That's Tim's [Harris Sr.] control. Ah, on paper I am the owner of the company, but Tim [Harris, Sr.] owns the company." **EICKE** was then asked, "Meaning you didn't have the authority? It's not your company?" **EICKE** responded, "I didn't have the authority to fire her. That's correct."

In addition, from May 1, 2005 through May 16, 2007, Harris enjoyed the lion's share of the revenue generated from gun sales at Elliot's Gun Shop. On June 21, 2006, Harris, accompanied by Zitzmann, purchased a new 2006 Nautic Star boat from Aqua Marine Boat Store for \$32,275.49. On or about June 19, 2006, Harris, or Zitzmann, accompanied by Harris, submitted \$7,000 cash, (or a \$7,000 cashier's check), as a down payment for the boat. On or about June 21, 2006, Harris or Zitzmann, accompanied by Harris, satisfied the balance remaining on the boat by tendering a check in the amount of \$25,275.42. The boat was titled in Harris and Zitzmann's names. Further, Harris and Zitzmann stated to the salesperson who consummated the boat transaction that they owned Elliot's Gun Shop.

On September 29, 2006, Harris, accompanied by Zitzmann, purchased a 2007 Chevrolet Avalanche from Bryan Chevrolet, Inc. for \$46,417.14. On or about September 27, 2006, Zitzmann, accompanied by Harris, submitted a payment to Bryan Chevrolet in the amount of \$500 cash. On September 29, 2006, Zitzmann, accompanied by Harris, submitted a check to Bryan Chevrolet in the

amount of \$34,377.99. The check was the proceeds of a loan Zitzmann received from Metairie Bank on or about September 27, 2006, which was secured by the balance in her personal savings account. Payments on the loan were made from October 5, 2006, until the loan was satisfied on December 7, 2006. On September 30, 2006, Zitzmann, accompanied by Harris, submitted a payment to Bryan Chevrolet in the amount of \$3,917.14 in cash. Finally, on October 2, 2006, Zitzmann, accompanied by Harris, submitted a cashier's check in the amount of \$7,000 to Bryan Chevrolet to satisfy the balance on the vehicle. On October 2, 2006, Zitzmann remitted \$7,000 in cash to Metairie Bank and Trust in exchange for the aforementioned cashier's check. Further, Harris and Zitzmann stated to the salesperson who consummated the vehicle transaction, that they owned Elliot's Gun Shop. (The dealership provided a \$1000 cash rebate which was applied to the price of the vehicle.)

On or about May 18, 2006, Harris purchased a piece of real property located at 1581-B Pecan Grove Road, Woodville, Mississippi for the price of \$95,000. Harris paid for the property by delivering \$95,000 in cash, in \$5,000 or \$10,000 bundles, or both, to the previous owner of the property. Harris, accompanied by Zitzmann, told the previous owner of the property that they "had a gun shop in Metairie."

On May 16, 2007, the United States seized cash in accounts which Harris exercised control over at Metairie Bank and Trust, which included: (1) a business checking account in the name of Elliot's Gun Shop that contained \$163,651.12; (2) a savings account in the name of Zitzmann that contained \$43,367.68; and, (3) a savings account in the name of Harris that contained \$14,277.96. In addition, from May 1, 2005 through on or about May 16, 2007, **EICKE** wrote himself a paycheck, drawn on the business account of Elliot's Gun Shop, for \$1,000 per week (**EICKE's** paycheck was

increased to \$1100 a week, beginning in or near the fall of 2006). All other employees received paychecks based on their hourly rate of employment, except Zitzmann, Employee #5, and Employee #6 (who were Harris's son and brother, respectively). There were no canceled payroll checks drawn on the business account of Elliot's Gun Shop, between May 1, 2005 to May 16, 2007, for Zitzmann, Employee #5, or Employee #6.

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